MALAYSIAN REPORTS

MOHAMED ABDULLAH ANG SWEE KANG v. PUBLIC PROSECUTOR

[S.C. (Mohamed Azmi, Hashim Yeop A. Sani & Wan Hamzah S.C.JJ.) May 18 & July 22, 1987]

[Kuala Lumpur – Supreme Court Criminal Appeal No. 91 of 1986]

Criminal Law – Penal Code, s.409 – Criminal breach of trust – Plea of guilty – Gravity of offence – Full restitution made – Sentence.

This was an appeal from the sentence imposed by the learned judge of the High Court on the appellant who had pleaded guilty to a charge under section 409 of the Penal Code. The learned judge sentenced the appellant to eight years' imprisonment plus a fine of $100,000, in default a further six months' imprisonment – see [1987] 2 M.L.J. 368.

Held: (1) in criminal breach of trust cases in general, a term of immediate imprisonment would be inevitable, save in very exceptional circumstances or where the amount of money involved was small. This must be the current sentencing policy even if the accused pleaded guilty;

(2) in assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, first, the gravity of the type of offence committed, secondly, the facts in the commission of the offence, thirdly, the presence or absence of mitigating factors, and further the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrent does not justify the sentencer in passing a sentence of greater length than the facts of the case warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence;

(3) in this case, certainly a sentence of immediate imprisonment for the offence of criminal breach of trust involving a sum of considerable magnitude had to be imposed and had to be one that should be sufficiently long to signify the gravity of the offence;

(4) in this case, the appropriate sentence if the appellant had claimed trial would have been around eight years, regard being had to the amount of money defalcated and the other circumstances of the case. It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence. In this particular case, apart from the plea of guilt, the sentence must also be discounted to reflect the full restitution and other mitigating factors. The sentence imposed on the appellant was therefore manifestly excessive and should be reduced to four years' imprisonment;

(5) the fact that the Penal Code had prescribed a larger maximum sentence for a section 409 offence than for similar cases in England did not justify the imposition of a sentence more severe than the gravity and circumstances of the offence would warrant. It was wrong in principle to double, without any good reason, what would otherwise be an adequate and fair period of imprisonment. Since full restitution had been made and the appellant had not enriched himself personally by the crime, there was no purpose in imposing a fine in addition to the custodial sentence. The fine of $100,000 imposed by the learned trial judge should be set aside.

Cases referred to:

(1) *Reg.* v. *Sargeant* (1974) 60 Cr. App. R. 74.
(2) *Reg.* v. *Davies* (1978) 67 Cr. App. R. 207.
(3) *Public Prosecutor* v. *Khairuddin* [1982] 1 M.L.J. 331, 332.
(4) *Reg.* v. *Barrick* (1985) 81 Cr. App. R. 78, 81
(5) *Public Prosecutor* v. *Muthu Lingam* [1986] 1 M.L.J. 432.
(6) *R.* v. *Ladd & Tristam* [1975] Cr. L.R. 50; Thomas Encyclopaedia of Current Sentencing Practice, p. 1058.
(7) *R.* v. *Meade* (1982) 4 Crim. App. R. (S) 193; Cr. L.R. 613.
(8) *R.* v. *Boyd* (1980) 2 Cr. App. R. (S) 234; Thomas Encyclopaedia of Current Sentencing Practice, p. 1061.

SUPREME COURT.

R.R. Chelliah (*Dulip Singh* with him) for the appellant.

Mohtar Abdullah (Deputy Public Prosecutor); *Tan Hock Chuan* (Deputy Public Prosecutor) with him for the respondent.

Cur. Adv. Vult.

Mohamed Azmi S.C.J. (delivering the judgment of the court): We have allowed this appeal and we now give our reasons for reducing the custodial sentence and setting aside the sentence of fine.

The appellant was convicted in the High Court at Kuala Lumpur on his plea of guilty to a charge of criminal breach of trust offence under section 409 Penal Code. The charge was in the following terms:

"That you on the 9th day of April, 1985 at No. 91, Jalan SS 21/1A, Damansara Utama, Petaling Jaya, in the State of Selangor, being an agent of Malaysia Overseas Investment Corporation Sdn. Bhd., to wit, the Managing Director and in such capacity entrusted with dominion over certain property, to wit, M$338,808.80, committed criminal breach of trust in respect of the said property and you thereby committed an offence punishable under section 409 of the Penal Code."

After hearing a plea in mitigation from his counsel, the appellant was sentenced to eight years' imprisonment and a fine of $100,000.00, in default another six months' imprisonment. The appeal to us was against the said sentence on the ground that:

(1) the sentence imposed by the trial judge was manifestly excessive in all the circumstances of the case; and

(2) the trial judge failed to take into account relevant considerations and/or took into account irrelevant considerations.

Although the classical principles applicable to all sentences were summed up in *Reg.* v. *Sargeant*[1] as retribution, deterrence, prevention and rehabilitation, in view of the prevalence of criminal breach of trust cases at the present time, we agreed to adopt the argument of Lawton L.J. in *Reg.* v. *Davies*[2] and accordingly we held that in this particular case only the elements of retribution and deterrence needed to be considered. As such, binding over the accused under section 173A or section 294 Criminal Procedure Code (which, in effect, is similar to a suspended prison sentence) or imposing a term of one day's imprisonment with fine would seldom be a suitable sentence to fit the crime of breach of trust particularly under sections 408 and 409 of the Penal Code. As stated in *Public Prosecutor* v. *Khairuddin*[3], an authority cited by the learned trial judge:

"The number of people placed in position[s] of trust has been growing steadily and rapidly both in the private and public sectors with corresponding increase in opportunities for such people to make easy money by dishonest means.

... Public interest demands that cases of this nature involving persons in positions of trust, particularly in financial institutions, must be dealt with severely, in the hope that would-be offenders would be deterred. Until it is understood by such people that the normal punishment for helping themselves to their employers' money is to be sent to prison, there will continue to be officials in commercial and cooperative banks and similar institutions, prepared to pilfer the till."

Consequently, we agreed with the principle laid down in *Reg.* v. *Barrick*[4] that in breach of trust cases in general, a term of immediate imprisonment would be inevitable, save in very exceptional circumstances or where the amount of money involved was small. This must be the current sentencing policy even if the accused pleaded guilty.

What had caused anxiety to the learned trial judge in this appeal was the length of the custodial sentence that should be imposed on a managing director of a company for committing breach of trust involving the sum of more than $300,000.00 but less than $400,000.00. In his 15-page judgment, the learned trial judge relied heavily on two English authorities – *Reg.* v. *Barrick*[4] and *Reg.* v. *Davies*[2], and after comparing them with two local cases – *Public Prosecutor* v. *Khairuddin*[3] and *Public Prosecutor* v. *Muthu Lingam*[5] (the latter case was incidentally decided by the learned trial judge in 1985) – he came to the following conclusion:

"If this court is to follow the trend set by these two cases (*Khairuddin* and *Muthu Lingam*) on the proper sentence to be passed in breach of trust cases which seems, albeit coincidentally, to be in line with the guidelines which have been given in the English case of *Barrick*, then, a term of 3½ to 4½ years would appear to be justified in the present case where the amount involved is $338,808.80. But then United Kingdom law is not nearly the same as local law in breach of trust cases."

Indeed, we held the view that the learned judge would have been perfectly justified if he had sentenced the appellant to a term between 3½ and 4½ years, because such sentence would not only be consistent with the two local authorities but would also be within the spirit of the guidelines suggested in *Barrick*. But unfortunately, the learned judge found it necessary for the purpose of section 409 to depart from the English guidelines by extending the recommended prison term to twice as long, and as well as to decline from following the trend of local authorities by imposing a very severe sentence of eight years, in addition to a fine. In *Barrick's* case, the Lord Chief Justice of England gave the following guidelines at p. 82:

"The sum involved is obviously not the only factor to be considered, but it may in many cases provide a useful guide. Where the amounts involved cannot be described as small but are less than £10,000 or thereabouts, terms of imprisonment ranging from the very short up to about 18 months are appropriate (see for example *Weston* (1980) 2 Cr. App. R. (S) 391). Cases involving sums of between about £10,000 and £50,000 will merit a term of about 2 to 3 years' imprisonment. Where greater sums are involved, for example those over £100,000, then a term of 3½ years to 4½ years would be justified (see for example the case of *Strubell* (1982) 4 Cr. App. R. (S) 300)."

The reason given by the learned judge for doubling the length of the suggested custodial sentence from 3½ to 4½ years to eight years was apparently due to the fact that the twenty years' maximum sentence in our section 409 was twice the length of the maximum sentence in England for a similar offence. Having considered the maximum punishment prescribed by sections 406, 407, 408 and 409 of our Penal Code, he concluded that the gravity of CBT in this country depended on the occupation of the offender, whereas it was not so in the United Kingdom. As such, the learned judge seemed to argue that since the sentence of four years' imprisonment in *Davies* was confirmed on appeal, in which the maximum sentence provided by English law was seven years, the English court would have sentenced Davies to eight years if the maximum sentence had been twenty years as provided for in

our section 409. This mathematical approach in doubling the term of imprisonment imposed in *Davies* and recommended in *Barrick* on the basis of the amount defalcated and assumed legislative intent could be found in the following passage of the learned judge's judgment:

"In *Barrick*, the total amount of the defalcations involved was £9,000 and the maximum sentence for the offences for which he was charged was 10 years. He received concurrent sentences of 2 years which were held, on appeal, to be not excessive. In *Davies*, the total amount involved in the defalcations amounted to £260,000 and the maximum sentence that could be imposed was 7 years. His sentence of 4 years' imprisonment was confirmed on appeal. But in this country for the offence under section 409 of the Penal Code the maximum sentence is 20 years ...

In the case of a section 409 offence, however, since the crime is considered by the legislature as very grave criminal conduct, the punishment, in order to fit the crime, is made especially severe – 20 years as the maximum term of imprisonment. The maximum punishment for this offence is twice the length of the maximum of the harshest United Kingdom punishment in breach of trust cases. Nonetheless, the *Barrick* guidelines are still useful but with this additional stipulation or rider in mind – that the length of the terms of imprisonment recommended in the guidelines be made twice as long. In view of these considerations and with the benefit of hindsight, it seems to this court that the sentence imposed by me in *Muthu Lingam (supra)* to which I have referred in this judgment was too lenient."

In our view, this approach of assessing sentence supposedly based on English authorities by harmonising them with the maximum sentence of twenty years in section 409 of the Penal Code was not only misleading but was wrong in principle. When the legislature fixed a maximum penalty for an offence, the discretion of the court in determining the extent to which in a particular case the punishment should be awarded must be exercised judicially. It must first be borne in mind that the guidelines in *Barrick* were introduced because of some divergence of opinion in the courts in England as to the policy of sentencing in breach of trust cases, particularly in the apparent leniency accorded by some courts to dishonest solicitors as compared to dishonest postmen and other lesser mortals, brought about no doubt by the criminal law in that country which did not seem to provide any difference in punishment on the basis of the offenders' occupation as was apparently done here by sections 406 to 409 of the Penal Code. We believed such divergence of opinion had not occurred here. Nevertheless, it seemed to us, the guidelines in *Barrick*, though useful, were only meant to emphasise that whatever the offenders' occupation might be there should be no great disparity in the sentence and that in CBT cases custodial sentence should be immediate and not suspended. Nothing more should be read into the judgment as intending to alter the established sentencing principles. In fact at p. 81, before laying down the guidelines, the Lord Chief Justice expressly made the following caution:

"It is, we appreciate, dangerous to generalise where the circumstances of the offender and the offence may vary so widely from case to case. In the hope that they may be helpful to sentencers generally, and may lead to a little more uniformity, we make the following suggestions."

Secondly, it must also be observed that at page 82 immediately after the guidelines, the Lord Chief Justice emphasised:

"The terms suggested are appropriate where the case is contested. In any case where a plea of guilty is entered, however, the Court should give the appropriate discount."

Thus, under *Barrick* guidelines, when the amount defalcated was over £100,000 (which would be equivalent to more than $400,000.00) then the term of imprisonment should be one of 3½ to 4½ years, if the offender claimed trial and was found guilty. On these guidelines, it would impossible to justify the sentence of eight years on the appellant where the amount defalcated was less than $400,000.00 and where he had pleaded guilty, notwithstanding the disparity in the maximum sentence between the law in England and this country for criminal breach of trust by a company managing director. There is therefore no real basis for holding the sentence of three years involving $100,000.00 where the accused had claimed trial in *Muthu Lingam*, or the one and a half years involving about $129,000.00 where the accused had pleaded guilty in *Khairuddin*, as too lenient or wrong in law or contrary to current sentencing policy in breach of trust cases. As regards *Davies*, it must not be overlooked that the four-year term was imposed not on a single charge of CBT but represented the concurrent sentences of several distinct charges. It was also the same in *Barrick* where the concurrent sentences imposed were two years.

The next question which we had to determine was whether the learned judge had given adequate discounts for mitigating factors so as to justify the sentence imposed. In short, was the sentence imposed manifestly excessive? What were the facts in this case relevant for the purpose of assessing sentence? The appellant was 40 years old, and was married with three children. He had made no financial gain at all himself from the criminal breach of trust. The charge indicated a loss of $338,808.80 to Malaysia Overseas Investment

Corporation Sdn. Bhd. (MOIC) of which he was the managing director at the relevant time. But, it was common ground that not a single cent of that sum entered his pocket. The money misappropriated was for the benefit of the National Rubber Smallholders Product Sdn. Bhd. (NARSPRO) who were in need of financial aid to buy machineries without which their factory could not operate. Full restitution with interest had been made by NARSPRO on May 2, 1986. It was therefore fair to say that MOIC had been deprived of their money from April 9, 1985 to May 2, 1986 – a period of just over a year. As a result of the financial assistance, NARSPRO became a successful business venture. The judge made special emphasis on the fact that the appellant had an interest in NARSPRO through a company known as MMB Holdings Sdn. Bhd., but this interest turned out to be a mere 6.7 percent equity participation which was comparatively quite minimal. The use to which MOIC money was put was a far cry from a classic case of CBT as in *Barrick* and *Davies* where the money was used for the offenders' personal and immediate benefit, and where the offence was committed with a good deal of ingenuity and skill in covering up the criminal activities. In this appeal, the CBT was not committed secretly by the appellant alone. In fact, another director of MOIC together with the appellant had signed the cheque with which the money was misappropriated. Up to date, the said director had apparently not been prosecuted for any offence which, to us, did not lend support to the prosecution's contention that the CBT in the instant case was one of the worst kind that merited an extraordinary deterrent sentence. On the facts, there was no similarity between the present case and the two English cases. The appellant's conduct in misappropriating MOIC money on a single occasion was purely for the purpose of saving NARSPRO from their initial financial difficulties with the apparent promise that NARSPRO would pay back the sum advanced, though this was done without the authority of MOIC's Board of Directors.

In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and, fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of greater length than what the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence. As stated by James L.J. in *R.* v. *Ladd & Tristam*[6]:

> "We have to look at the overall picture of what is the right sentence for the total involvement, the total degree of criminality involved, and we have to keep the sentences in perspective with the sentences that have been passed on other occasions for offences involving criminal activity of this kind, though of course varying in their gravity. Clearly a deterrent element has to be involved, but because the offences are very serious, it does not necessarily follow that on the particular facts very long sentences are justified."

A sentencer must give sufficient discount for all extenuating circumstances pertaining to the degree of culpability or criminality involved, which must necessarily vary from case to case apart from other mitigating factors. Unless there is a proper reason for withholding such credits, failure to do so may result in the sentencer not exercising his or her discretion judicially in assessing the level of custodial sentence. In *R.* v. *Meade*[7], a young man who pleaded guilty to arson was granted a reduction in his sentence of six years' imprisonment in what would otherwise have been the proper sentence for such a serious offence. In the course of his judgment, Lord Lane C.J. said:

> "A term of five to six years, whatever the age of the offender may be, is in many cases of using a petrol bomb a perfectly appropriate sentence, because these weapons are rightly called bombs. They can cause the most fearful injuries and this case demonstrates the sort of damage they can cause to property. But having said that, the help that he gave to the police and his plea of guilty earn him a discount, which does not appear to have been given by the judge."

In this appeal, certainly a sentence of immediate imprisonment for the offence of CBT involving a sum of considerable magnitude had to be imposed and had to be one that should be sufficiently long to signify the gravity of the offence. But on the length of the sentence, we had come to the conclusion, as indeed was the initial finding of the learned judge himself, that a term of between 3½ and 4½ years would be fair and adequate on the basis of *Khairuddin* and *Muthu Lingam*, and on the principles laid down in *Barrick*. For determining the length of custodial sentence in pleading-guilty cases, the test to be adopted could be found in *R.* v. *Boyd*[8] where Cumming-Bruce L.J. said:

> "The policy of the courts is that where a man does plead guilty, which does give rise to public advantage and avoids the expense and nuisance of a trial, which may sometimes

be a long one, the court encourages pleas of guilty by knocking something off the sentence which would have been imposed if there had not been a plea of guilty. So one asks oneself, if there had been a plea of not guilty, and he had been convicted, what would have been the appropriate sentence? The answer to that is that the appropriate sentence in these circumstances would not have been more than three years. That points to the fact that this sentence was rather on the heavy side, because it did not give sufficient allowance for the plea of guilty."

When we asked ourselves the same question here, the appropriate sentence if the appellant had claimed trial would have been around eight years, regard being had to the amount of money defalcated and the other circumstances of the case. Clearly on this test, the sentence imposed on the appellant was manifestly excessive. It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence. In this particular case, apart from the plea of guilty, the sentence must also be discounted to reflect the full restitution made and the other mitigating factors. Although the learned judge indicated in his judgment that he had given the necessary discounts, they were not reflected at all in the sentence imposed. We were satisfied from his judgment that the learned judge had imposed the eight years' sentence purely on the basis of extending twice as long the English guidelines found in *Barrick* and the sentence imposed in *Davies*, without regard to the particular facts of this case and without giving the appellant any or sufficient credit for all the mitigating circumstances. The recommended prison terms in *Barrick* were not meant for pleading-guilty cases. If the learned judge had not fallen into error in misreading the facts and the law in *Barrick* and *Davies*, he would probably have found that a four-year sentence would adequately fit the crime which by any standard was severe enough to satisfy the justice of this case. In our view, the fact that our Penal Code had prescribed a longer maximum sentence for section 409 offences than for similar crimes in England did not justify the imposition of a sentence more severe than what the gravity and circumstances of the offence would warrant. It was wrong in principle to double without any good reason what would otherwise be an adequate and fair period of imprisonment. Since full restitution had been made and the appellant had not enriched himself personally by the crime, we found no purpose in imposing a fine in addition to custodial sentence.

Bearing in mind all those matters, we have allowed this appeal by reducing the sentence imposed on the appellant to four years' imprisonment from the date of his arrest, and by setting aside the fine of $100,000.00.

Appeal allowed.

Solicitors: *Dulip Singh & Co.*

ABDUL KARIM BIN ABDUL GHANI v. LEGISLATIVE ASSEMBLY OF SABAH

[S.C. (Hashim Yeop A. Sani S.C.J.) September 7, 1987]

[Kuala Lumpur – Supreme Court Civil Application No. 21 of 1987]

Constitutional Law – Application for leave to commence proceedings for declaration that law enacted by legislature of State of Sabah is invalid on ground that the legislature concerned has no power to enact it – Application frivolous – Leave refused – Constitution (Amendment) Enactment, 1986 of Sabah – Federal Constitution, arts. 4(3) & (4), 74(4), Eighth Schedule and Ninth Schedule.

Legal Profession – Whether States of Malaya advocate and solicitor is qualified to appear before judge of Supreme Court in Kuala Lumpur – Advocates Ordinance (Sabah, Cap. 2), s.8.

The applicant applied for leave to commence proceedings for a declaration that the Constitution (Amendment) Enactment, 1986, of Sabah is invalid on the ground that the legislature of Sabah has no power to enact it. The declarations sought were as follows:

(a) a declaration that the respondents are not empowered to make laws with respect to the matter of disqualification for membership of the Assembly as effected by The Constitution (Amendment) Enactment No. 3 of 1986.

(b) a declaration that The Constitution (Amendment) Enactment No. 3 of 1986 of the State of Sabah thereby effecting an amendment to The Constitution of the State of Sabah by addition of Clause 2(d) to Article 18 thereto is null and void and of no effect by reason of the respondent's incompetence to enact the same.

Held: (1) the subject of disqualification of a member of the Legislative Assembly of the State is a State subject and it is also obvious that disqualification is a subject within the competency of a State;

(2) if the new provision in the Constitution (Amendment), Enactment, 1986, is regarded as a provision for the tenure of seats of members of the State Legislature, then it is certainly a State matter clearly falling under Item 7 (Machinery of State Government) of the State List;